

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Extension Of Section 272 Obligations)
Of Verizon In The State Of Massachusetts)

WC Docket No. 02-112

REPLY COMMENTS OF AT&T CORP.

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GLOSSARY OF COMMISSION ORDERS

SHORT CITE	FULL CITE
<i>Bell Atlantic-GTE Merger Order</i>	Memorandum Opinion And Order, <i>Application Of GTE Corp., Transferor, And Bell Atlantic Corp., Transferee, For Consent To Transfer Control</i> , 15 FCC Rcd. 14032 (2000)
<i>Fifth Competitive Carrier Order</i>	Report and Order, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore, CC Docket No. 79-252, 98 FCC 2d 1191 (1984)
<i>LEC Classification Order</i>	Second Report and Order, <i>Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area</i> , 12 FCC Rcd. 15756 (1997)
<i>Massachusetts Section 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts</i> , CC Docket 01-9, 16 FCC Rcd 8988 (2001)
<i>Massachusetts 271 Remand Order</i>	Order on Remand, <i>Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. For Authorization to Provide In-Region, InterLATA Services in Massachusetts</i> , CC Docket No. 01-9, DA 04-422 (rel. Feb. 20, 2004)
<i>New York 271 Order</i>	Memorandum Opinion and Order, <i>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, Inter-LATA Service in the State of New York</i> , 15 FCC Rcd. 3953 (1999)
<i>Non-Accounting Safeguards Order</i>	First Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of Non Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended</i> , 11 FCC Rcd. 21905 (1996)
<i>Non-Dominance FNPRM</i>	Further Notice of Proposed Rulemaking proceeding in FCC WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111 (rel. May 19, 2003)
<i>Operate Independently NPRM</i>	Public Notice, <i>In the Matter of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates</i> , WC Docket No. 03-228, DA-03-3742, (rel. Nov. 21, 2003)

<i>Operate Independently Order</i>	Report and Order, <i>In the Matter of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates</i> , WC Docket No. 03-228, FCC 04-54, (rel. March 17, 2004)
<i>SBC-Ameritech Merger Order</i>	Memorandum Opinion and Order, <i>Applications Of Ameritech Corp., Transferor, And SBC Communications Inc., Transferee, For Consent To Transfer Control Of Corporations</i> , 14 FCC Rcd. 14712 (1999)
<i>Second Order on Reconsideration, Non-Accounting Safeguards</i>	Second Order on Reconsideration, <i>Implementation of the Non-Accounting Safeguards</i> , 12 FCC Rcd. 8653 (1997)
<i>272 Sunset Notice</i>	Notice of Proposed Rulemaking, <i>Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements</i> , 17 FCC Rcd. 9916 (2002).
<i>Verizon OI&M Forbearance Proceeding</i>	<i>Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules</i> , CC Docket No. 96-149

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. (“AT&T”) respectfully submits these reply comments in support of its Petition requesting that the Commission extend application of the separate affiliate and other safeguards of 47 U.S.C. § 272 to Verizon’s Massachusetts operations for an additional three years.

INTRODUCTION AND SUMMARY

In its Petition, AT&T demonstrated that Congress intended the “crucial[ly] important[.]”¹ section 272 safeguards to remain in effect until a Bell operating company (“BOC”) has lost its ability to exercise market power. AT&T further demonstrated that Verizon continues to enjoy market power in Massachusetts today, and will do so for the foreseeable future. For this reason, and because of the evidence of discrimination and cost misallocation collected in the section 272 audit, despite its overly narrow scope, there could be no reasoned basis for eliminating existing section 272 obligations.

¹ *Massachusetts Section 271 Order* ¶ 226.

In its comments, Verizon contends that there is substantial facilities-based competition in Massachusetts because “Comcast provides cable telephony in Massachusetts and has boasted of achieving penetration rates of as high as 25 percent” and because “wireless ‘has contributed to an overall decline in the volume of traffic on traditional wireline networks.’”² Yet, the FCC in its most recent *Local Competition Report* found that cable telephony accounts for only a 2% share of the local telephone services market. Verizon’s suggestion that cable telephony enjoys a 25% share of the local market in Massachusetts is the result of misleading editing and juxtaposition.³ Nor does Verizon adduce any evidence to support its claim that there is substantial facilities-based *local access* competition from wireless, since the material it cites relates to long distance service. Verizon has engaged in such sleights of hand to avoid addressing the statements it has made to its investors, that even non-facilities based competition in Massachusetts has leveled off, and its most recent submission in response to the Commission’s request for data in the *Non-Dominant NPRM* proceeding showing that the number of switched access lines (consumer or business) in Massachusetts controlled by Verizon has declined very little in the past two years.⁴

Verizon also attempts to dismiss the evidence uncovered in the section 272 audit that it is using its local bottlenecks to discriminate systematically against rivals. Verizon does not deny the accuracy of the evidence, but rather argues that it should be subject to further analysis.

² Comments of Verizon on Petition of AT&T (filed March 12, 2004) (“Verizon”) at 2.

³ Verizon edited out the introductory language “incumbent local exchange carriers still serve nearly 95 percent of the residential local telephone market” and the qualifier to the 25 percent penetration range. The “boast” was actually that Comcast had “25 percent or higher *cable telephony penetration*.” The claimed boast also never referenced Massachusetts. That was added in by Verizon.

⁴ Verizon, in its January 29, 2004 investor briefing, reported that in the most recent two quarters it has *reversed* the rate of UNE-P net additions. See <http://investor.verizon.com/news/20040129/20040129-2.pdf> (“Verizon 4th Quarter & Full Year 2003 Financial Results,” Doreen Toben) at 16; Letter from Dee May, Verizon, to Marlene Dortch, FCC, Non-Dominance FNPRM (filed Feb. 13, 2004), the last attachment thereto at 2.

However, when the “further analysis” Verizon suggests is done, it is apparent that the discrimination and cost misallocation identified in the audit is significant, has no reasonable justification, is persistent and has an anticompetitive effect on the marketplace.

Unable to rebut evidence that Verizon is dominant and has, in fact, abused its market power, Verizon falls back to its time-worn argument that the section 272 safeguards should be eliminated because they hobble Verizon’s ability to compete in long distance markets. Verizon’s recent statements to the investment community should put this claim to rest once and for all. According to Verizon, it already has gone from zero to over 50 percent share of the residential long distance customers in Massachusetts – a phenomenal result in less than three years that highlights Verizon’s enduring local market power.⁵ Thus, Verizon is now the *largest* residential long distance provider in Massachusetts. Whatever “burdens” section 272 may impose on Verizon, one thing is clear: existing section 272 obligations did not prevent Verizon from quickly becoming the dominant long distance provider in its local territories. Indeed, Verizon’s experience only confirms the need to strengthen, rather than abandon, existing protections against discrimination and cross-subsidization.

ARGUMENT

I. THE COMMENTS DEMONSTRATE THE NEED FOR THE RETENTION OF SECTION 272 SAFEGUARDS IN MASSACHUSETTS.

AT&T’s Petition demonstrates the need to retain the section 272 safeguards in Massachusetts because Verizon continues to exercise overwhelming market power in Massachusetts.⁶ The uncontroverted evidence establishes that Verizon continues to control the

⁵ <http://investor.verizon.com/news/20040129/20040129-4.pdf> (Lawrence T. Babbio Jr. presentation) at 6.

⁶ See AT&T Petition, WC Docket No. 02-112 (filed Feb. 10, 2004) (“AT&T Petition”) at 5-8.

bottleneck local facilities over which virtually all local and long distance calls to and from Massachusetts must travel. That is, Verizon retains overwhelming dominant local market power in Massachusetts and will continue to do so for years to come. The uncontroverted evidence likewise demonstrates that the Auditor in the second biennial audit uncovered data showing that Verizon has been engaging in the competition-destroying discrimination and cross-subsidization that the Section 272 safeguards were designed – and are needed – to detect and, ultimately, discourage.

A. The Relevant Standard For Determining Whether The Section 272 Safeguards Should Be Extended Is Whether The BOC Retains Market Power.

Verizon, without citing any statutory language or legislative history, asserts that Congress “adopted a statutory presumption that the Section 272 requirements would sunset in three years after a BOC obtained Section 271 authority”⁷ and that this presumption cannot be rebutted, even by evidence that the BOC: (1) retains the type of monopoly market power over local service that Verizon retains here, and (2) has used that market power to engage in the type of discrimination and cross-subsidization that the Section 272 safeguards were designed to deter and detect. Verizon’s arguments would effectively render the claimed presumption “irrebuttable” and would render section 272(f)(1), which authorizes the Commission to extend the section 272 safeguards, a nullity.

Section 272 was designed to bridge the gap between the “fundamental postulate underlying modern telecommunications law” – namely, that the BOCs will “have both the incentive and ability to discriminate against competitors in incumbent LECs’ retail markets”

⁷ Verizon at 4.

until their monopoly local telephone markets become fully competitive⁸ – and the Section 271 command that BOCs be allowed to provide in-region long distance services when their local markets are merely *open* to competition. Section 272 reflects Congress’ recognition that, even after a BOC is permitted to provide long distance service in a state, it will continue to have substantial market power in its local markets in that state.⁹ Accordingly, Section 272 “sets out a series of formal structural and transactional obligations intended to check LECs’ incentive to leverage their bottleneck assets into market power over other telecommunications services,” *ASCENT v. FCC*, 235 F.3d 662, 667 (D.C. Cir. 2001), and thereby to undermine both existing long-distance competition and fledgling competition in local markets.¹⁰ As the Commission observed, Section 272 is “designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting.”¹¹

In Section 272(f)(1), Congress provided that the Section 272 safeguards would “sunset” in a state three years after a BOC in the state is authorized under Section 271 to provide long distance services, but it expressly authorized the FCC to extend the requirements. 47 U.S.C.

⁸ *Bell Atlantic-GTE Merger Order* ¶ 173; *SBC-Ameritech Merger Order* ¶¶ 12, 190; *United States v. Western Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992) (MFJ reflected recognition that “a corporation that enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market”); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 188 (“there are many ways in which the company controlling the local exchange monopoly could discriminate against competitors in the interexchange market”).

⁹ *See Non-Accounting Safeguards Order* ¶¶ 9-13 (1996).

¹⁰ *Id.* ¶¶ 9-13, 206; *see also Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 490-91 (2002) (a company that “control[s] a local exchange could “place conditions or fees . . . on long-distance carriers seeking to connect with its network” and, “[i]n an unregulated world, another telecommunications carrier would be forced to comply with the[] conditions” the dominant local carrier imposed, or else the competing carrier “could never reach the customers of a local exchange”).

¹¹ *Non-Accounting Safeguards Order* ¶ 9; *see id.* ¶¶ 9-19, 206; *see also ASCENT*, 235 F.3d at 667; *Second Order on Reconsideration, Non-Accounting Safeguards*, ¶ 5 (1997) (“Congress . . . enacted section 272 to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when the BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive”).

§ 272(f)(1). Thus, Congress never expressed the view, either in the Act or its legislative history, that the Section 272 requirements *should* be terminated at the end of three years. To the contrary, Congress merely recognized that it could not predict how long local competition sufficient to dissipate a BOC's local market power would take to develop. Rather, Section 272(f)(1) reflects Congress' recognition that it would take *at least* three years for that to happen, and Congress thus granted the FCC authority to assess market conditions and to maintain the Section 272 safeguards to protect the public interest.¹²

The Commission, in the *Non-Accounting Safeguards Order*, stressed that the section 272 rules should remain in place “until *facilities-based* alternatives to the local exchange and exchange access services of the BOCs make those safeguards no longer necessary.”¹³ Verizon dismisses this as “an introductory sentence” and further notes that the Commission, in a brief filed in *AT&T v. FCC*, referred to this sentence as “aspirational.”¹⁴ But this statement by the Commission was neither an isolated statement nor merely “aspirational.” To the contrary, the Commission made clear throughout its *Non-Accounting Safeguards Order* that the Section 272 safeguards were necessary as long as a BOC retains market power, because the BOC has incentives, *inter alia*, “to discriminate in providing exchange access services and facilities that its [long distance] affiliate's rivals need to compete in the interLATA telecommunications services and information services markets.”¹⁵ As the Commission observed, “[t]his artificial advantage

¹² 42 Cong. Rec. H1171 (statement of Rep. Conyers) (explaining that these requirements were imposed “to check potential market power abuses”); Conference Report at 151 (explaining that these requirements are “necessary to protect consumers [and] to prevent anticompetitive behavior”).

¹³ *Non-Accounting Safeguards Order* ¶ 13 (emphasis added).

¹⁴ Verizon at 3. This was an appeal to the D.C. Circuit Court of Appeals (No. 03-1035) of the *New York 271 Order*.

¹⁵ *Id.* ¶ 11.

may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer.”¹⁶ Accordingly, the Section 272 structural, accounting and nondiscrimination safeguards were targeted to detect and prevent such market power abuses and thereby to “ensure that competitors of the BOC’s [long distance] affiliate have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against competitors and in favor of the BOC’s affiliate.”¹⁷ Indeed, the Commission, in its most recent notice of proposed rulemaking regarding extension of the Section 272 safeguards, sought comment on the state of competition three years after section 271 authorization and whether it was sufficient to constrain the BOCs ability to discriminate against competing providers of interexchange services.¹⁸

Permitting the Section 272 safeguards to expire while Verizon retains market power would also be inconsistent with the Commission’s twenty-year history of imposing separate affiliate requirements on dominant LEC participants in the interLATA market. Since its *Fifth Competitive Carrier Order* in 1984, the Commission has required independent LECs to provide interexchange services through a separate affiliate in order to be treated as non-dominant in long distance markets.¹⁹ In light of the fact that the Commission has found that such independent LECs “are less likely to be able to engage in anticompetitive conduct than the BOCs,”²⁰ a

¹⁶ *Id.* ¶ 12.

¹⁷ *Id.* ¶ 13.

¹⁸ *272 Sunset Notice* ¶ 12. Contrary to Verizon’s assertion (at 4, n. 7), AT&T has not “manipulate[d] the Commission’s language to distort its meaning.” The Commission would not have asked for comments about “the nature of the marketplace three years post entry” if it could not extend section 272 beyond three years even if the evidence showed, as it does in this proceeding, that the BOCs’ control of the local bottleneck had not materially diminished.

¹⁹ *Id.*

²⁰ *LEC Classification Order* ¶ 190.

fortiori, it would be arbitrary for the Commission to relieve the BOCs of section 272 safeguards as long as they too retain market power.

B. The Comments Confirm That Verizon Has Overwhelming and Dominant Market Power In Massachusetts.

The record could not be clearer that effective local competition has failed to develop in Massachusetts and, as a result, Verizon continues to possess substantial market power. Facilities-based competition is almost non-existent and competitors are still dependent upon Verizon's facilities to compete – and, therefore, are subject to Verizon's incentive and ability to engage in discriminatory conduct.

Verizon's claims that there is significant facilities-based competition, stating that "Comcast provides cable telephony service in Massachusetts and has boasted of achieving penetration rates of as high as 25%."²¹ This assertion is, at best, misleading. Verizon heavily edited a statement made by AT&T's then chairman M. Armstrong at the time of the Comcast/AT&T Broadband merger that "[a]lthough incumbent local exchange carriers still serve nearly 95 percent of the residential local telephone market ... AT&T Broadband has already gained 25 percent or higher *cable telephony penetration* in 55 communities."²² Nowhere is Massachusetts mentioned. To the extent that Verizon is suggesting that Comcast has a 25% share of the local access market in Massachusetts, that implication is belied by the Commission's most recent FCC *Local Competition Report*,²³ a report that Verizon itself relies upon,²⁴ and

²¹ Verizon at 2.

²² www.att.com/news/item/0,1847,10302,00.html (emphasis added).

²³ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Status as of June 30, 2003* (rel. Dec. 22, 2003) ("December 2003 FCC Local Competition Report") Table 3.

²⁴ Verizon at 6.

which concludes that cable telephony services, as of the end of June, 2003, serve only “about 2% of total switched access lines,”²⁵ and that total CLEC market share in Massachusetts for the same time frame was only 19%.²⁶ Indeed, cable modem service is unavailable to 30 percent of U.S. homes and is rarely available for small business customers at all.²⁷

Verizon’s claim of additional facilities-based competition from wireless services, by noting that “one recent study concludes that average long distance minutes of use per subscriber have declined ... because of substitution by wireless and e-mail”²⁸ is irrelevant to Verizon’s control of the local bottleneck. Market evidence, as well as evidence adduced in other proceedings, demonstrate that there is little facilities-based local access competition from wireless services. On the demand side, consumers have been very reluctant to substitute their wireline local service with wireless service.²⁹ On the supply side, wireless service providers are highly dependent on the BOCs’ local bottleneck.³⁰

²⁵ *December 2003 FCC Local Competition Report* at 2.

²⁶ *December 2003 FCC Local Competition Report* at Table 7. That Report further reported that in June 2002, at the time the “boast” was made, total CLEC market share in Massachusetts was 16%. *Id.*

²⁷ AT&T Reply Comments, Non-Dominance FNPRM (filed July 28, 2003) at 17.

²⁸ Verizon at 6.

²⁹ *See, e.g.*, Jon Van, “Demand lacking for home-to-cell phone number moves” *Chicago Tribune*, 2003 WL 69403754, December 12, 2003 (“Local phone companies had predicted that hundreds of thousands -- possibly even millions -- of customers would abandon wired phone service when new federal rules allowing such a switch took effect two weeks ago. But the number who actually have taken the plunge is very small, numbering in the hundreds, SBC Communications Inc. reported Tuesday”).

³⁰ AT&T Wireless Comments, Non-Dominance FNPRM (filed June 30, 2003) at 8 (wireless carriers are highly dependent on ILEC local bottleneck facilities to connect end users to their points of presence and to carry traffic between their switches and the cell stations where antennas establish connections to users. and wireless carriers’ dependence on ILEC facilities will only increase in the future as wireless carriers expand their networks). Moreover, Verizon’s wireless affiliate is one of the largest wireless providers.

The evidence clearly shows that Verizon has continued to dominate the local market throughout the three year period in which it has had section 271 authority with little competition from cable telephony, VoIP³¹ or wireless services. Thus, in a recently filed summary of “Switched Access Lines In-Service,” Verizon reported that in December 2003 it had maintained 86% of the business and consumer access lines in Massachusetts that it had back at the beginning of 2001.³²

C. The Comments Confirm That Verizon Continues To Discriminate Against Unaffiliated InterLATA Competitors in Massachusetts And To Misallocate Costs In Ways That Would Not Be Detected If the Section 272 Safeguards Are Allowed To Sunset.

In its Petition, AT&T provided substantial evidence that Verizon has discriminated against unaffiliated interLATA providers.³³ This included clear evidence of ongoing price squeezes and discrimination in favor of Verizon’s retail customers over its wholesale customers for special access services. Verizon’s Comments do not address AT&T’s price squeeze claims, confusing the UNE related price squeeze claim dismissed in the *Massachusetts 271 Remand Order*³⁴ with the three “bundled service” price squeeze claims described in the Selwyn declarations appended to AT&T’s Petition.³⁵ Nor does Verizon meaningfully respond to the retail/wholesale discrimination issue.³⁶

³¹ Verizon’s reliance (at 8) on Vonage, the most successful VoIP service, is similarly misplaced. Vonage claims only to have “more than 100,000” lines in service nationwide, *see* http://www.vonage.com/corporate/press_index.php?PR=2004_02_19_0.

³² Letter from Dee May, Verizon, to Marlene Dortch, FCC, Non-Dominance FNPRM (filed Feb. 13, 2004), last attachment at 2 (switched access lines declined from 4,635,339 during the first quarter of 2001 to 3,981,194 at the end of the fourth quarter of 2003).

³³ AT&T Petition at 14-19.

³⁴ Verizon at 7.

³⁵ AT&T at 10-11, n. 29 (relating to Verizon’s: (i) Variations Freedom (sm) plan offered in Massachusetts where the average price per minute for interstate and intrastate calling combined was below the intrastate switched access rates; (ii) “Metropolitan Service” offered in the greater
(continued . . .)

In its Petition, AT&T also provided evidence from the section 272 audit of discrimination in the installation and repair of special access services. Despite its failure to evaluate rigorously Verizon's compliance with section 272, the biennial audit confirms pervasive discrimination and violation of the structural and transactional safeguards by Verizon in clear violation of section 272. This includes an overwhelming number of violations of the transactional rules.³⁷ The Auditor similarly found persistent and statistically significant discrimination in the installation and maintenance of DS-1 service in Massachusetts. That is, the Firm Order Confirmation Response Time ("FOC") and "Average Installation" intervals for DS-1 service in Massachusetts were, for unaffiliated carriers, consistently and materially longer than for the 272 affiliate.³⁸ Non-affiliates similarly received poorer repair service than the section 272 affiliates in Massachusetts.³⁹

(. . . continued)

Boston area where toll routes are incorporated into the subscriber's unlimited calling area; in other parts of the state the "Circle Calling Service" converts toll routes within a roughly 20 mile radius to local rate treatment; and (iii) offer to Massachusetts residential customers of a flat rated LATA-wide unlimited calling plan as well as optional extended calling plans to provide flat-rate calling to points that would otherwise be subject to toll charges).

³⁶ Verizon simply refers the Commission to its state filings. Verizon at 14.

³⁷ For example, those violations involve provisioning services to the Section 272 affiliates prior to the execution of a written agreement or amendment, failing to post agreements on the web in a timely and complete manner and failing to make these agreements available for public inspection. AT&T's Comments on the Second Verizon Biennial Audit, EB Docket No. 03-200 (filed Feb. 10, 2004) at 20-28.

³⁸ *Id.*, Attachment 1 – Declaration of Dr. Robert Bell ("Bell Decl.") ¶¶ 6-9. For FOC intervals, *see* Report of PricewaterhouseCoopers LLP, EB Docket No. 03-200 (filed Dec. 12, 2003) ("Verizon's Second Biennial Auditor's Report"), Attachment A-15 to A-16; for "Average Installation" intervals, *see* A-17 and A-19. The percent of access services installed on time ("Percent Met") data also showed a preference for the 272 affiliate over unaffiliated carriers. *Id.* A-18 and A-20.

³⁹ Bell Decl. ¶ 10. *See* Verizon's Second Biennial Auditor's Report, Attachment A-21 to A-22. Indeed, as Dr. Bell notes, Bell Decl. ¶ 10, the data may understate the differential inasmuch as Verizon excluded "trouble" data that should have been included under the business rules Verizon used. Verizon's Second Biennial Auditor's Report, Appendix A:77.

Verizon argues in its Comments that demonstrating that the performance metric data was statistically significant is “simply ‘a reasonable basis for us to begin our analysis.’”⁴⁰ But the “further analysis” urged by Verizon demonstrates that the evidence of discrimination is compelling. That is, the further analysis called for by the Commission required an examination of:

[T]he explanation that Bell Atlantic and other commenters provide about whether these differences provide an accurate depiction of the quality of Bell Atlantic's performance. For instance, we may examine the data on a more disaggregated level, in order to evaluate arguments made by Bell Atlantic that competitive LEC error, or differences in the composition of competitive LEC orders, or sudden changes in the quantity or timing of orders made by competitive LECs, are responsible for the apparent poor performance. We also may examine how many months a variation in performance has existed and what the trend has been in recent months. A steady improvement in performance over time may provide us with an indication that problems are being resolved. It may also provide us with evidence as to whether Bell Atlantic's systems are scaleable and can handle large volumes of orders for services. Finally, in some instances, we may find that statistically significant differences in measured performance may exist, but that such differences have little or no competitive significance in the marketplace. As such, we may deem such differences non-cognizable under the statutory standard.⁴¹

Verizon proffered explanations for the longer installation⁴² and repair⁴³ intervals. However, Dr. Bell, AT&T's expert, demonstrated that the data Verizon claimed substantiated its explanations did not do so.⁴⁴ The audit data also show that the discriminatory treatment persisted over time

⁴⁰ Verizon at 11, citing to the *New York 271 Order* ¶ 57.

⁴¹ *New York 271 Order* ¶ 59.

⁴² Verizon's Second Biennial Auditor's Report, Appendix A:71-A:73 (Verizon claimed that unaffiliated carriers: (1) tended to request installation dates that were longer than the standard interval; (2) required building of facilities more often than affiliated carriers (because unaffiliated carriers tended to purchase special access on both high density and less dense routes while the 272 affiliates focused only on the former); and (3) orders involved copper facilities rather than fiber orders).

⁴³ *Id.* A:73-A:75 (The fiber versus copper difference also allegedly explained the differences in maintenance data because trouble incidents are typically less frequent and can be restored more quickly on fiber).

⁴⁴ Bell Decl. ¶¶ 14-17. Indeed, another BOC, SBC, in a subsequent audit, sought to explain the differences in the data by claiming that unaffiliated carrier behavior was precisely the opposite of what Verizon claimed it was in its efforts to explain away the discriminatory treatment of
(continued . . .)

and was therefore systemic.⁴⁵ The anti-competitive impact of unaffiliated carriers receiving relatively worse installation and repair intervals is self-evident.

Verizon argues that the Section 272 affiliates' orders were too small to make a finding of statistical significance.⁴⁶ However, Dr. Bell, made it clear that a "statistical significance" finding could be made from the data provided, and Verizon has not proffered an expert who disagrees – indeed, it has not proffered an expert at all.

Verizon further asserts that for one performance metric, FOC intervals, the discrimination was less systemic for non-DS-1 service.⁴⁷ The short answer is that the evidence of systemic discrimination with respect to DS1 service (for all installation measures and not only for FOC intervals) is sufficient to show discriminatory conduct by Verizon and to demonstrate the need for continuation of the Section 272 safeguards. In any event, there was also compelling evidence of discrimination for non-DS1 services.⁴⁸

Finally, as part of its "further analysis," the Commission should take into account the fact that Verizon has repeatedly avoided more intense scrutiny by inducing the Auditor to use

(. . . continued)

unaffiliated carriers. *See* Ernst & Young, Section 272 Biennial Report for SBC Communications, Inc., EB Docket No. 03-199 (filed Dec. 17, 2003) ("SBC Second Biennial Audit"), Appendix A at 44-45 ("SBC represented that their root cause analysis for the measurement related to customer desired due date reveals that non-affiliates requested due dates less or equal to the standard due date interval about twice as often as affiliates").

⁴⁵ *Compare, e.g.*, Verizon's performance in Massachusetts on "Average Installation Interval" for DS 1 service in October 2001 (272 affiliate: 27 business days; non-affiliated carriers: 29.9 business days) with October 2002 (272 affiliate: 18.0 business days; non-affiliated carriers: 24.5 business days). Verizon's Second Biennial Auditor's Report, Attachment A-17 and A-19.

⁴⁶ Verizon at 12.

⁴⁷ *Id.*

⁴⁸ Bell Decl. ¶ 10 (longer repair intervals for FGD service in Massachusetts).

performance metrics that mask its discriminatory conduct.⁴⁹ In the most recent audit, Verizon avoided the application of the more rigorous performance metrics urged by AT&T,⁵⁰ *i.e.*, the Joint Competitive Industry Group Proposal Regarding Performance Metrics and Installation Intervals for Interstate Special Access Services submitted in the *Special Access Docket*.⁵¹ Because the data from the less rigorous metrics used in the Verizon biennial audit still demonstrated discrimination, *a fortiori* discrimination would have been shown if more rigorous metrics had been used.

D. AT&T Is Not Seeking A Blanket Rule, But Rather Is Seeking Extension Of the Section 272 Safeguards In Massachusetts, Based on Verizon’s Dominance Of, And Its Discriminatory Conduct In, That Market.

Contrary to Verizon’s assertion, and as is evident from the evidence submitted with the Petition and discussed above, AT&T is not “advocating a general rule that would apply everywhere,”⁵² but is rather requesting an extension “based on unique circumstances in Massachusetts [and] on [a] need for specific action there.”⁵³ The evidence adduced by AT&T demonstrates that Verizon has monopoly control of the local service bottleneck *in Massachusetts*. The evidence further demonstrates that Verizon used its market power to

⁴⁹ In the first audit, Verizon unilaterally substituted performance metrics that avoided the type of disaggregation of services required by the applicable *General Standard Procedures* and necessary to identify discrimination, and the Commission in its *NAL* noted as much. *In the Matter of Verizon Telephone Companies, Inc. Apparent Liability for Forfeiture*, File No. EB-03-IH-0245 (rel. Sept. 8, 2003) ¶ 16, n.18 (Verizon’s unilaterally imposed metrics did not disaggregate the data “to a level sufficient to permit a service-by-service discrimination analysis”).

⁵⁰ Letter from Patrick Merrick, AT&T, to Marlene Dortch, FCC, CC Docket No. 96-150 (filed May 9, 2003) at 2.

⁵¹ *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321 Letter from Joint Competitive Industry Group to The Honorable Michael K. Powell (filed Jan. 22, 2002).

⁵² Verizon at 3.

⁵³ *Id.* at 2.

discriminate in the provision of special access services (in favor of both its Section 272 affiliate and its retail customers) *in Massachusetts* and to engage in price squeezes *in Massachusetts*.

II. VERIZON FAILS TO OFFER ANY PLAUSIBLE JUSTIFICATION FOR ELIMINATING CORE SECTION 272 SAFEGUARDS

A. Verizon's Claim That The Section 272 Safeguards Are Too Costly Is Contrary To Theory And Fact.

Verizon claims that the Section 272 safeguards should be eliminated because they are burdensome.⁵⁴ In this regard, Verizon repeats its oft-stated canard that “AT&T is blindly trying to handicap its BOC competitors with the costs and operational inefficiencies of operating through separate affiliates.”⁵⁵ As AT&T has demonstrated numerous times,⁵⁶ AT&T seeks nothing more than a “level playing field.” Whatever costs and inefficiencies the Section 272 safeguards impose on the BOCs and their Section 272 affiliates, they are *no different* than the costs and inefficiencies faced by the BOCs’ competitors, and they are outweighed by the potential anticompetitive effects that would result if the Section 272 safeguards are not extended.

In terms of costs, Verizon has offered nothing more than the *ipse dixit* assertion of costs to support its position.⁵⁷ As AT&T’s expert, Dr. Selwyn previously demonstrated,⁵⁸ what Verizon refers to as its “step-by-step explanation of its costing methodology and the specific percentages of expenses in each category that could be saved” is devoid of meaningful content.⁵⁹

⁵⁴ *Id.* at 7-9.

⁵⁵ *Id.* at 2.

⁵⁶ See, e.g., Letter from Aryeh Friedman, AT&T, to Marlene Dortch, FCC, *Verizon OI&M Forbearance Proceeding*, CC Docket No. 96-149 (filed Oct. 31, 2003) at 1.

⁵⁷ *Id.* at 14.

⁵⁸ Verizon at 15.

⁵⁹ Declaration of Dr. Lee L. Selwyn, appended to Letter from David Lawson, on behalf of AT&T, to Marlene Dortch, FCC, WC Docket No. 96-149 (filed July 9, 2003) ¶¶ 3-4; see also Letter from Aryeh Friedman, AT&T, to Marlene Dortch, FCC, WC Docket No. 96-149 (filed Oct. 1, 2003) at 2-3.

Verizon's "analysis" consists of a table that lists *ipse dixit* percentages of expenses for various categories, which it then applies to *ipse dixit* claimed total expenses with the results of that multiplication being the *ipse dixit* claimed overall "cost savings." Verizon provided no explanation as to how these percentages were derived other than to say that they were based on "assumptions" by unidentified "subject matter experts."⁶⁰ As a result, there is no way to test any of Verizon's assumptions.⁶¹

Moreover, despite Verizon's claims that it is hobbled by Section 272, its long distance offerings continue to enjoy unprecedented success. Verizon has told the investment community that it has over 50% of the residential interLATA long distance market share in Massachusetts – a phenomenal result in less than three years after entry that highlights Verizon's enduring market power in local markets.⁶² Thus, Verizon is now, by a wide margin, the *largest* residential long distance provider in that state. These facts simply cannot be squared with Verizon's claim that Section 272 puts it at a "competitive disadvantage."

⁶⁰ Verizon June 24, 2003 Ex Parte at 6.

⁶¹ In other proceedings before the Commission, the evidence submitted by Verizon would have been held to have been woefully deficient, *see, e.g., Massachusetts 271 Remand Order* ¶ 12 (summarizing evidence submitted by AT&T) and ¶ 14 (setting forth the additional evidence which the Bureau held should have been submitted). In the *Operate Independently NPRM* proceeding, the Commission, in its rush to judgment, accepted these cost studies. *Operate Independently Order* ¶ 27. But that does not cure their deficiency, and they should not be accepted here.

⁶² <http://investor.verizon.com/news/20040129/20040129-4.pdf> (Lawrence T. Babbio Jr. presentation) at 6 (reporting 52% "Consumer LD Line Penetration of VZ Switched Access Lines;" this was an increase from 37% in 2002 and 21% in 2001). Reporting on the region as a whole, Verizon reported that it had an "in-region market penetration of 41 percent" and that "48 percent of Verizon residential customers have purchased local services in combination with either Verizon long distance or Verizon DSL or both." <http://investor.verizon.com/financial/quarterly/VZ/4Q2003/4Q03Bulletin.pdf> (Verizon Investor Quarterly, January 29, 2004) at 2 and 4.

Finally, Verizon ignores the fact that the Commission has loosened many of the restrictions on the BOC, including, most recently, the Operations, Installation & Maintenance (“OI&M”) safeguard allowing the Verizon BOC and its 272 affiliates to share services and take advantage of other economies.⁶³ The fact is that the BOCs have been able to capture unprecedented market shares using affiliates that have only a small fraction of the employees of established long distance carriers.⁶⁴

B. The Existence Of Other Regulatory Protections Is Not A Reason To Gut Section 272

Finally, Verizon argues that, despite Congress’ decision to impose detailed structural, accounting and transactional safeguards in Section 272, the benefits provided by those safeguards are minimal, and can be obtained instead by relying on other provisions of the Act and Commission rules.⁶⁵ These claims are meritless. Indeed, given that most of the rules that Verizon cites were in effect in 1996, Congress would not have enacted Section 272 if it believed those rules could be effective in policing the BOCs’ misconduct and eliminating discrimination and cost misallocation. Rather, Section 272, when properly implemented and vigorously enforced, provides substantial and unique benefits that promote competition in telecommunications markets.

The state commission comments in the *272 Sunset Proceeding* confirm the value of particular Section 272 safeguards, like the biennial audit. The Missouri Public Service Commission reports that “without the section 272 audit process, there is no way to detect and

⁶³ *Operate Independently Order*.

⁶⁴ See AT&T 272 Sunset Reply Comments, Selwyn Reply Dec ¶¶ 6-8.

⁶⁵ Verizon at 9-10.

deter discrimination and anti-competitive behavior.”⁶⁶ Further, the Pennsylvania Public Utilities Commission reports that the separate structure and accounting provisions of Section 272 “assist[] the PA PUC in its ability to design rates,” and the “ability to readily identify costs and revenues from the business segment is *critical* to ongoing rate review.”⁶⁷ And more generally, the Pennsylvania commission asserts that the collapse of separate affiliate requirements would “perpetuate[] what appears to be a continual reduction in available information.” *Id.* at 4. As these comments show, Section 272 can provide unique, pro-competitive benefits that, contrary to the BOCs’ claims, cannot be obtained from other existing rules and provisions of the Act.

In all events, the Commission itself rejected the argument that its existing safeguards are a more effective and less costly mechanism for preventing discrimination than structural separation. In the *SBC-Ameritech Merger Order*, the Commission determined that adopting the proposed separate affiliate structure benefited competition because “reliance on existing regulatory safeguards is misplaced.”⁶⁸ That is because even though the Commission “issues rules to prevent discrimination,” it is “impossible for the Commission to foresee every possible type of discrimination.”⁶⁹ Accordingly, the Commission found that “SBC’s offer to establish a separate subsidiary for advanced services is directly responsive” to concerns regarding the

⁶⁶ Missouri PSC 272 Sunset Comments at 4, WC Docket No. 02-112 (filed Aug. 5, 2002); *see also* Washington UTC 272 Sunset Comments at 3 (“maintaining a separate affiliate makes the audit process easier and provides more transparency to the transactions to be audited”); Pennsylvania PUC 272 Sunset Comments at 4, WC Docket No. 02-112 (filed Aug. 5, 2002) (“audits can produce useful information for policymakers such as the PUC”).

⁶⁷ Pennsylvania PUC 272 Sunset Comments at 5.

⁶⁸ *Ameritech-SBC Merger Order* ¶ 206.

⁶⁹ *See id.* ¶ 220. *See also* *Bell Atlantic-GTE Merger Order* ¶ 208.

Commission’s ability to detect discrimination – but achieves that goal in a way that avoids “engaging in detailed regulatory oversight.”⁷⁰

Verizon argues that “[a]ny discrimination in favor of the BOC’s retail customers would have to be apparent to customers to give a BOC an unfair advantage in the marketplace, and any discrimination that was apparent to customers would also be easily detected by the BOCs’ competitors as well as by the Commission.”⁷¹ However, Verizon does not explain how discrimination in the installation or repair of special access services (*e.g.*, the Verizon retail customer obtains installation in 5 days, but the wholesale customer in 8 days) would be “apparent” to either customer. Nor would there be any incentive for the retail customer, particularly where it is relying on the BOC for ongoing service, to inform the BOC’s competitors of the preferential treatment. Nor does Verizon explain how a competitor would obtain sufficient market-wide data (rather than data simply reflecting its own experience) to be able to demonstrate a pattern of discrimination rather than simply anecdotal incidents of preferential treatment.

CONCLUSION

For the foregoing reasons, the Commission should issue a rule extending application of Section 272 to Verizon in Massachusetts for an additional three years.

Respectfully submitted,

⁷⁰ *Ameritech-SBC Merger Order* ¶ 211. In the *Operate Independently Order*, the Commission did not hold that the non-structural safeguards were “sufficient” to replace any structural safeguard other than the OI&M safeguard (and then only with modifications to the Cost Allocation Manual). *Id.* ¶ 18. Thus the Commission retained the joint ownership safeguard despite the BOCs’ argument about the sufficiency of non-structural safeguards, *id.* ¶ 32, and in the same context reaffirmed the critical importance of the “separate officers, directors, and employees” requirement of section 272(b)(3), *id.* ¶ 11.

⁷¹ Verizon at 9. As to discrimination in favor of its own long distance operations by giving itself superior service, Verizon simply says that such discrimination would violate Section 272(e)(1). *Id.* at n. 19. The problem is detecting such discrimination in the absence of the Section 272 audit; Verizon simply ignores this problem.

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March 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2004, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 19, 2004
Bedminster, N.J.

/s/ Karen Kotula

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